

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
2002 Biennial Regulatory Review – Review)	MB Docket No. 02-277
of the Commission’s Broadcast Ownership)	
Rules and Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications Act)	
of 1996)	
)	
Additional Comment on UHF Discount in)	
Light of Recent Legislation Affecting)	
National Television Ownership Cap)	
)	
)	

**REPLY COMMENTS OF
THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC.,
BLACK CITIZENS FOR A FAIR MEDIA, PHILADELPHIA LESBIAN AND GAY
TASK FORCE, AND WOMEN’S INSTITUTE FOR FREEDOM OF THE PRESS**

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SUMMARY

The Office of Communication of the United Church of Christ, Inc., Black Citizens for a Fair Media, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press (UCC *et al.*) submit reply comments primarily responding to comments submitted by proponents of the UHF discount.

As UCC said in its original comments, the question of whether the FCC continues to have authority to modify or repeal the UHF discount should be resolved by the plain language of Section 629 of the Consolidated Appropriations Act of 2004, which does not mention or affect the UHF discount. The only intent that is clear on the statute's face is that Congress intended to roll back the 45% cap set by the FCC in the 2002 Biennial Report to 39% in order to avoid future consolidation. Limiting the FCC's authority to modify or repeal the UHF discount would freeze it at 50% and result in tremendous consolidation after the transition to digital television.

Proponents of the UHF discount resort to legislative intent and other tools that are not applicable here to counteract the plain meaning of the statute. Even when those tools are applied, however, they work in favor of retaining FCC authority to modify or eliminate the UHF discount.

Proponents of the UHF discount also incorrectly apply the "ratification doctrine" to Section 629. The language in Section 629 is not sufficient enough to support the assertion that the phrase "national audience reach" has been substantially reenacted and therefore limits the FCC's authority over underlying regulations. Even if the ratification doctrine applies here, however, the only longstanding interpretation that could be "reenacted" is the Commission's long history of continuing to reevaluate the efficacy of the UHF discount.

Proponents of the UHF discount also inconsistently argue that the Commission no longer has the authority to modify or repeal the UHF discount, which is a "rule related to" national

audience reach, but must reassess the sunset provisions, another rule “related to” national audience reach. Commenters are at cross-purposes that cannot be reconciled under their interpretation of Section 629.

Finally, the Supreme Court has recently issued an opinion holding that the word “any” must be read in context and does not always have the expansive interpretation that proponents of the UHF discount apply to the “any rules related to” language in Section 629(3). The context of Section 629(3) requires a narrow reading in order to avoid absurd results.

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UCC *et al.* (UCC) respond herein to proponents of the UHF discount who suggest that the FCC’s authority to modify or eliminate the UHF discount is limited by Section 629 of the Consolidated Appropriations Act of 2004. Pub. L. No. 108-199 § 629, 118 Stat. 3 (2004) (Appropriations Act).¹

**I. CONGRESS HAS NOT STATED ANY INTENT TO LIMIT FCC
AUTHORITY TO MODIFY OR REPEAL THE UHF DISCOUNT**

As UCC said in its initial comments, the question of whether the FCC continues to have the authority to modify or repeal the UHF discount should be resolved by concluding that the plain language of Section 629 does not mention or affect the UHF discount. UCC at 5, 8, 10; *see also* NASA at 7-9, Capitol Broadcasting Co. at Appendix A, Hearst-Argyle at 3-6. Proponents

¹ The question of the FCC’s authority to modify or repeal the UHF discount is separate from whether it is in the public interest to do so. Substantive proposals regarding the continued efficacy of the discount should be disregarded. *See e.g.* Sinclair at 3-4; Tribune at 8-12.

of the UHF discount simply do not deal with this reality. They resort to legislative intent and other tools that need not be applied here.

The inclusion of statutory language that merely refers to FCC rules does not limit FCC authority to review or change those rules unless something in the plain language limits the FCC's authority. For example, in *Sinclair v. FCC*, Sinclair argued that Section 202(g) of the 1996 Act removed the FCC's authority to limit grandfathering of local marketing agreements (LMAs). 284 F.3d 148, 165 (2002). Section 202(g) provides that “[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.” *Id.* Congress had employed a regulatory term: “local marketing agreements” in Section 202(g) of the 1996 Act. At that time, the FCC did not treat LMAs as an attributable interest for the purpose of the ownership limits. However, the FCC subsequently changed its attribution rules to include LMAs that meet certain thresholds. *Id.* It further decided to grandfather LMAs in violation of the ownership limits only until the 2004 biennial review when it would assess the appropriateness of extending that status on a case-by-case basis. *Id.* Sinclair asserted that limiting the grandfathering of LMAs violated section 202(g). The court rejected this argument and held that even after express Congressional approval of LMAs, the FCC properly exercised its authority to limit grandfathering.

Unlike Section 202(g), which explicitly states that Section 202 should not be construed to prohibit the “origination, continuation, or renewal” of LMAs, Section 629 says nothing at all about the UHF discount. Since the more direct plain language of 202(g) did not remove FCC authority to change rules related to LMAs, Section 629 certainly does not remove FCC authority to change rules underlying the “national audience reach,” including the UHF discount.

II. THE RATIFICATION DOCTRINE DOES NOT APPLY TO THE APPROPRIATIONS ACT

Proponents of the UHF discount argue that using the term “national audience reach” triggered the “ratification doctrine, under which Congress is presumed to have adopted the settled judicial interpretation of a statute when it reenacts the statute,” thereby limiting the FCC’s authority to modify or eliminate the UHF discount. Fox at 8 (citations omitted); *see also* Tribune at 5; NAB at 1; Univision at 3, 4-6; Networks at 4, 6; Paxson at 3-4, 8. However, these commenters misapply the ratification doctrine to the language of Section 629. The ratification doctrine does not apply to Sections 629(1) and 629(3) because they are not “reenactments” nor are they “without change.”

Even if the ratification doctrine were triggered here, its purpose is to maintain the status quo. The ratification doctrine states that “the reenactment by Congress, without change, of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction.” *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337, 339 (1908). *See* Univision at 4; Fox at 7. Even if the mere use of the words “national audience reach” in Section 629(3) and indirect reference to them in Section 629(1) somehow trigger the ratification doctrine, the only reasonable conclusion is that Congress reenacted the entire body of rules related to the national ownership cap, including, at its core, ongoing reassessment of whether the discount is in the public interest and a “phased-in elimination of the discount” as circumstances require. *1998 Biennial Report*, 15 FCC Rcd at 11058, 11080 ¶ 38 (1998); *see also* UCC at 3-4. Thus, when applied properly, the ratification doctrine approves the FCC’s continuing authority to reassess, modify, and eliminate the UHF discount.

A. The Use Of “National Audience Reach” Is Not Sufficient Language To Support Application Of The Ratification Doctrine

Despite claims in some comments, *see, e.g.*, Tribune at 5, NAB at 1, Univision at 3, 4-6, Fox at 4, 6, Paxson at 3-4, 8, Section 629(1), which amends Section 202(c), does not actually repeat the words “national audience reach.” It merely changes 35% to 39%. Therefore, there is no reuse or reenactment of the phrase and the ratification doctrine does not apply to Section 629(1). Fox alone suggests that use of the phrase “national audience reach” in Section 629(3), amending Section 202(h) of the 1996 Act, is further evidence of the removal of FCC authority to modify or eliminate the UHF discount. Fox at 6-7. However, use of the phrase “national audience reach” in Section 629(3) and mere reference to Section 202(c) of the 1996 Act in Section 629(1) does not qualify as reenactment. Neither rises to the substantive level necessary for reenactment.

The D.C. Circuit has clarified that in order to rise to the level of reenactment, a statute must use very similar language to a previous statute or rule. *Chisholm v. FCC*, 538 F.2d 349, 362 (D.C. Cir. 1976). Petitioners in that case contended that the Federal Election Campaign Act reenacted Section 315 of the Communications Act and therefore approved the prior administrative construction. *Id.* However, the court found that argument “wholly unpersuasive” because “the nature of the ‘reenactment’ was extremely limited” and the cases upon which petitioners relied were “distinguishable: all involved more specific reenactments.” *Id.* at 362-63.

The D.C. Circuit determined that the reuse of statutory language in *Chisholm* did not rise to the level of “reenactment” because the new statute did not use the “express” language of a previous regulatory definition. 538 F.2d at 362-63. The court compared the statutory language in *Chisholm* to *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956), where the Supreme Court refused to allow a new administrative definition of “debenture” because Congress had exhibited

express approval of the 23 year old definition when it incorporated a similar definition into the statute by amendment. Section 629 is similarly distinguishable. On its face, neither 629(1) nor 629(3) rises to the level of “express” approval of the underlying definitions, including the UHF discount. Neither mentions the UHF discount at all.

Similarly, cases cited by proponents of the UHF discount actually deal with far more substantial levels of reenactment and can be easily distinguished from the facts and statutory language before the Commission in this proceeding. For example, several commenters cite *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) or *Bragdon v. Abbott*, 524 U.S. 624 (1998), to argue that repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations. *See* Fox at 3, 7; Sinclair at 2; Univision at 5; Paxson at 8; Tribune at 5. However, both *Toyota* and *Bragdon* involved interpretations of the Americans with Disabilities Act (ADA). The statutory language of the ADA specifically states that “[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title.” *Toyota*, 534 U.S. at 599; *Bragdon*, 524 U.S. at 631-32 (emphasis added). This provision of the statute explicitly referred to both a previous statute and to existing regulatory construction. There is no language in the Appropriations Act that refers to the UHF discount in such a substantial manner.²

² In addition, neither *Toyota* nor *Bragdon* addressed the question of agency authority. In *Toyota*, the Court expressly found that “no agency has been given authority to issue regulations interpreting the term ‘disability’ in the ADA. Nonetheless, the EEOC has done so We assume without deciding that they are [reasonable], and we have no occasion to decide what level of deference, if any, they are due.” *Toyota*, 534 U.S. at 599-60.

Fox also relies on *Lorillard v. Pons*, 434 U.S. 575 (1978), which involved far more specific and substantive “reenactment” than the Appropriations Act. In *Lorillard*, Congress incorporated language lifted directly from the Federal Labor Standards Act into the Age Discrimination in Employment Act. 434 U.S. at 576-89. The language was literally taken from a previous statute or specifically directed that the new Act be enforced in accordance with the “powers, remedies, and procedures” of specifically referenced sections in the preceding statute. *Id.* at 580-81. Section 629 does not rise to nearly the same level of duplication of the 1996 Act, nor does it specifically direct the FCC to implement policies or procedures in existence under the 1996 Act. In fact, the entire purpose of Section 629 is to change and in no way “reenact” the procedures mandated in Sections 202(c) and 202(h) of the 1996 Act.

While Fox argues that Congress’ use of the phrase “national audience reach” in Section 202(c) in the 1996 Act also constitutes Congressional adoption of the UHF discount, Fox at 6, neither the Commission nor any commenters interpreted 202(c) that way at the time. Indeed, the Commission asked whether it should modify or repeal the UHF discount in the 1998 and 2002 Biennial Reviews and did not find it necessary to ask whether the 1996 Act somehow limited its authority. *1998 Biennial Review NOI*, 13 FCC Rcd 11276, 11285 ¶27 (1998); *2002 Biennial Review NPRM*, 17 FCC Rcd 18503, 18544 ¶ 130-31 (2002).

B. Section 629 Is Not “Without Change” And Does Not Support Application Of The Ratification Doctrine

Although proponents of the UHF discount cite different cases describing the ratification doctrine, most include the notion that the statute must be reenacted “without change.” *Cerecedo*, 209 U.S. at 339; *see, e.g.*, *Univision* at 4 (“when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change....” (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986))); Fox at 7 (“applying a

substantially reenacted statute” is deemed to have Congressional approval (citing *Comm’r of Internal Revenue v. Noel*, 380 U.S. 678, 682 (1965)). Section 629 is not without change. In fact, its entire purpose is to change the national audience reach cap and the procedures of periodic FCC review or the media ownership rules.

The D.C. Circuit in *Chisholm* similarly found that the reuse of language in the Federal Election Campaign Act did not constitute ratification because it was not “repeatedly reenacted without change.” 538 F.2d at 362-63. For example, the court found that the reuse of language in *Chisholm* did not rise to the level of that in *Helvering v. Reynolds Tobacco Co.*, 306 U.S. 110 (1939). In *Helvering*, the Supreme Court held that the “reenactment of the Revenue Acts without alteration indicated Congressional approval of the administrative construction of the Treasury Department; hence, the construction had attained the force of law. In that case, however, the specific statutory provision had been fully restated and repeatedly reenacted without change in each successive Revenue Act.” *Id.* (citing *Helvering*, 306 U.S. at 114-15).

Section 629 can be similarly distinguished. Unlike *Helvering*, it is not a “specific statutory provision” that has been “fully restated and repeatedly reenacted without change.” *Id.* Section 629(1) does not fully restate Section 202(c); it changes the words 35% to 39% and does not even repeat the words “national audience reach.” Section 629(3) uses the words “national audience reach” to create new provisions and conditions for the FCC’s periodic review of media ownership rules, adding an entirely new sentence to Section 202(h).

III. IT IS INCONSISTENT TO ARGUE THAT THE FCC CAN NO LONGER REVIEW THE UHF DISCOUNT BUT MUST REVIEW THE SUNSET PROVISIONS

Commenters present two arguments at cross-purposes with one another. Proponents of the UHF discount argue inconsistently that while the FCC’s authority to modify or eliminate the

UHF discount – a “rule related to” the national audience reach – is limited, the authority to alter the sunset provisions – also a “rule related to” national audience reach – remains. The NAB argues that the Commission cannot make any decisions regarding the UHF discount because that will affect the 39% cap. NAB at 2. However, NAB also states that “this does not mean that the UHF discount should not be modified in light of future changes in television assignments.” NAB at 2. Fox states that the Appropriations Act ratified the UHF discount. Fox at 7-9. Fox also argues that “the Commission is obligated to reevaluate whether the sunset of the discount remains an appropriate and rational policy choice” or it should “defer further consideration of eliminating the UHF discount for all television stations . . . until the conclusion of the digital transition. Fox at 12. Paxson argues that the FCC is not free to reconsider retaining the UHF discount and any reconsideration would be “entirely unreasonable and directly contrary to Congress’ understanding” of the Appropriations Act. Paxson at 6. However, Paxson also states that the Commission “should revisit its decision to sunset the UHF discount” for certain networks and “consider sunsetting it nearer the close of the DTV transition.” Paxson at 15-16.

Proponents of the UHF discount cannot have it both ways. If the Commission cannot modify the UHF discount because it is a “rule related to” national audience reach, then it also cannot modify any sunset provision, which is also a “rule related to” national audience reach. The difference of opinion among commenters regarding how to dispense with the sunset provisions shows complexity of the “rules related to” national audience reach. Congress could not have intended to take back the authority over this regulatory area from the expert agency charged with its administration.

IV. COMMENTERS' AFFIRMATIVE ARGUMENTS CAN BE INTERPRETED EITHER TO REMOVE OR CONTINUE FCC AUTHORITY OVER THE UHF DISCOUNT

Proponents of the UHF discount cite examples from legislative history that they claim show Congressional intent to limit FCC authority to modify or eliminate the UHF discount.

However, the same examples can be easily interpreted to support the FCC's continuing authority to modify or eliminate the UHF discount.

A. Assertions That 1996 Act Legislative History Supports Removal Of Authority Also Supports Continuation Of Authority

Proponents of the UHF discount cite to one section of the 1996 Act House Report which they claim supports their interpretation. Sinclair at 2; Fox at 5; Paxson at 5. In the 1996 Act, the House Report said:

This section does not change the methodology for calculating "national audience reach" currently employed by the Commission. For example, currently, the audience reach of UHF stations is discounted. This "UHF discount" appropriately reflects the technical and economic handicaps applicable to UHF facilities and the Committee does not envision that the UHF discount calculation will be modified so as to impede the objectives of this section."

H.R. No. 104-204 at 118 (1995); Sinclair at 2; Fox at 5; Paxson at 5. Proponents claim that the language in the House Report support a reading that the FCC no longer has the authority to modify or eliminate the UHF discount since passage of the Appropriations Act. *See e.g.* Paxson at 5. However, the FCC's contemporaneous construction of the statute was to the contrary.

Reading the 1996 Act as well as the legislative history, the Commission contemporaneously held that the 1996 Act "did not address the issue of the measurement of audience reach for the purposes of the new limits." *Broadcast Television National Ownership Rules NPRM*, 11 FCC Rcd 19949, 19949 (1996). The Commission interpreted this supposed Congressional approval

of the UHF discount as leaving intact Commission authority to modify or repeal the discount if the record warranted such action.

Indeed, the Commission has continued to follow that construction by continuing to reevaluate the UHF discount. For example, in 1996 the Commission requested comment on “whether it should impose in the interim any supplementary limitation on national audience reach.” *Id.* at 19956. In 1998, the Commission requested comment “on whether the UHF discount should be retained, modified, or eliminated.” *1998 Biennial NOI*, 13 FCC Rcd 11276, 11285 ¶27 (1998). Also in 1998, the Commission noted that the UHF discount will “not work well for DTV,” and it would issue an NPRM “proposing a phased-in elimination of the discount.” *1998 Biennial Report*, 15 FCC Rcd 11058, 11080 ¶ 38 (1998). In 2002, the Commission invited further comment on “the relevance and continued efficacy of the UHF discount.” *2002 Biennial NPRM*, 17 FCC Rcd 18503, 18544 ¶ 130-31 (2002).

The Appropriations Act includes no approval of the UHF discount that begins to compare to the approval in the 1996 Act. Therefore, proponents’ argument that the 1996 Act’s legislative history approved of freezing the UHF discount based on three words in the Appropriations Act is inapposite. If anything, it supports the view that even when Congress expressly approves a regulatory construction, the agency still retains the authority to modify that construction.

Moreover, the statements of one house of Congress relating to one bill eight years ago cannot serve as proof of the intent of contemporary Congressional action. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 484-85 (1997); *United States v. Price*, 361 U.S. 304, 313 (1960).

B. Assertions That The History Of The Appropriations Act Supports Removal Of Authority Also Supports The Continuation Of Authority

Proponents of the UHF discount argue that amendments that proposed to phase out the UHF discount but were not included in the final Appropriations Act are proof that Congress intended that the Commission not reconsider the modification or elimination of the UHF discount. *See* Fox at 9-10; Paxson at 6. However, it is well-established law that failure to pass an amendment is not reliable evidence of Congressional intent. The Supreme Court has stated that “several equally tenable inferences” may be drawn from Congressional failure to enact an amendment, “including the inference that existing legislation already incorporated the offered change.” *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *United States v. Wise*, 370 U.S. 405, 411 (1962). *Pension* explains that legislative inaction could be interpreted to mean that Congress did not need to act because the potential change was already incorporated into the bill. The same analysis could easily apply here. When the Appropriations Act was passed, the Commission had already released its 2002 Biennial Report, stating an intent to sunset the UHF discount for the top four networks and to review how to handle sunset for other stations in a future biennial. The fact that a bill that did not include an amendment to phase out the UHF discount passed could indicate that Congress assumed that the sunset was already adequately provided for by the 2002 Biennial. “[I]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the statutory interpretation.” *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994). The rejected amendments can be interpreted several ways and are not persuasive in the analysis of whether the FCC retains authority to modify or repeal the UHF discount.

Moreover, legislative history cannot trump the plain language of the statute. Proponents of the discount rely on statements from individual members of Congress, but merely infer that

these statements express an intent regarding the FCC's authority over the UHF discount, even though they do not actually mention the UHF discount. *See e.g.* Tribune at 6-7. The only intent that is clear from the statute is that Congress intended to roll back the 45% cap set by the FCC in the 2002 Biennial Report to 39% in order to avoid future consolidation. Freezing the UHF discount at 50% would result in massive future consolidation upon transition to digital television. Commenters also claim that Congress was concerned about the divestiture required if the cap was set below 39%. *See* Univision at 4; Sinclair at 2; Tribune at 6. However, the only divestiture concern was the possibility of the immediate divestiture of two companies, Fox and Viacom. Congress did not express any concern regarding future divestiture. In fact, Congress recognized that future divestiture could occur and made provisions for those circumstances in Section 629(2).³ In addition, the FCC can and does grandfather stations that are in violation of ownership rules and that would require divestiture. This grandfathering policy led to entities owning up to 39% when the national audience reach cap was set at 35%.

V. USE OF THE PHRASE “ANY RULES RELATED TO” DOES NOT LIMIT THE FCC’S AUTHORITY TO MODIFY OR ELIMINATE THE UHF DISCOUNT, ESPECIALLY IN LIGHT OF THE RECENT SUPREME COURT OPINION IN *NIXON*

Proponents of the UHF discount argue that the UHF discount is a “rule related to” the national audience reach and since “any rules” related to the cap cannot be quadrennially reviewed, the discount cannot be reconsidered. Tribune at 4; Univision at 6-7; Paxson at 7.⁴ In

³ “(3) Divestiture.—A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.” Appropriations Act, § 629(2).

⁴ Paxson also specifically argues that the Commission cannot consider the UHF discount during the Reconsideration phase of the 2002 Biennial Review. Paxson at 7. However, any impact that

its comments, UCC has already explained that the plain language of Section 629(3) did not mention the UHF Discount and therefore did not affect it, that interpreting the amendment as eliminating FCC authority over the UHF discount would illogically freeze the use of Nielson data as well, and that at most the phrase “any rules relating to” is ambiguous and must be reasonably interpreted not to limit FCC authority. UCC at 9-16. While UCC has adequately addressed commenters’ arguments already, we would like to take this opportunity to advise the Commission regarding a recent and pertinent Supreme Court decision.

As the Supreme Court has explained, the word “any” should be read in context and is not always expansive. On March 24, 2004, the Supreme Court issued an opinion in *Nixon v. Missouri Municipal League* holding that the word “any” is not unlimited, means different things in different settings, and is interpreted to contain limitations when an expansive reading would bring about absurd or unintended results. No. 02-1238 (U.S. Mar.24, 2004).

In *Nixon*, the state of Missouri had enacted a statute forbidding its political subdivisions from providing or selling a telecommunications service or facility. Municipalities and municipally owned telecommunications facilities petitioned the FCC to preempt the state law based on 47 U.S.C. § 253 which permits preemption of state laws that prohibit “any entity” from providing telecommunications services. Slip Op. at 2-3. The FCC refused to preempt the statute stating that the phrase “any entity” did not include political subdivisions. Slip Op. at 3. The Eighth Circuit reversed, explaining that “any” was strong enough evidence of Congressional awareness of the inclusion of both public and private entities. Slip Op. at 4. However, the

the Appropriations Act may have will only affect future quadrennial reviews. The Appropriations Act of 2004 cannot affect the Commission’s ability to reconsider its actions in the 2002 Biennial Review. *Murray v. Gibson*, 15 How. 421, 423 (1854) (statutes do not operate retroactively unless “required by express command or by necessary and unavoidable implication”); *Shwab v. Doyle*, 258 U.S. 529, 537 (1922) (“[A] statute should not be given a retrospective operation unless its words make that imperative”).

Supreme Court agreed with the FCC and held that the word “any” does not include private and public entities because such an expansive reading of the phrase “holds sufficient promise of futility and uncertainty to keep us from accepting it.” Slip Op. at 13.

The Court recited a litany of the absurd results that could occur from an expansive reading of “any” in *Nixon*.⁵ In the same way, **an expansive reading of the phrase “any rules” in Section 629(3) “holds sufficient promise of futility and uncertainty.”** Proponents of the UHF discount argue that the discount is a rule related to “national audience reach” and since “any rules” related to the cap cannot be quadrennially reviewed, the discount is frozen.

However, this analysis, if approved by the FCC, would then apply to every rule that could impact national audience reach, not merely the UHF discount. Interpreting Section 629(3) as removing FCC authority to review “any rules” related to national audience reach would bring about absurd results on par with those described by the Supreme Court in *Nixon*.

- **Limiting FCC authority would result in confusion over the sunset provision and no FCC authority to ameliorate the confusion.** Simply questioning FCC authority over the UHF discount has already resulted in many contradictory analyses of the effect on the sunset provision described in the 2002 Biennial Report, as exemplified by comments received in this proceeding. *See infra* at 7-8; *see also* UCC at 13-14. Removing FCC authority over “any rules related to” the national audience reach would leave only Congress to decide the complex sunset problems.

⁵ The Court lists several hypothetical examples to illustrate the absurd results of an expansive interpretation of “any” in section 253. For example, applying an expansive reading of “any” in section 253 would result in nationwide inconsistency because states would be treated differently depending on individual laws regarding the functions of municipalities. “That Congress meant § 253 to start down such a road in the absence of any clearer signal than the phrase ‘ability of any entity’ is farfetched.” Slip Op. at 7-12.

- **Limiting FCC authority would lead to the absurd result of allowing massive consolidation upon transition to digital television.** If the UHF discount were to remain frozen, it would allow significant media consolidation upon completion of the digital transition because most of the VHF television stations on the air today will become UHF stations. *See* NASA at 10-11.
- **Limiting FCC authority to amend 47 C.F.R. § 73.3555(d)(2)(i), which contains the UHF discount, would also have the bizarre effect of locking in the FCC to forever using Nielson’s Designated Market Areas.** That rule mandates calculation of national audience reach based on Nielson data. Nielson is a private company that provides the Commission with proprietary data and over which the Commission has no control. In fact, the Commission has already switched companies once, from Arbitron to Nielson, when Arbitron stopped updating its county-by-county data. *Broadcast Television National Ownership Rules*, 15 FCC Rcd 20743, 20752-53, ¶ 31-32 (1999); *see also* UCC at 14-15.
- **Limiting FCC authority could also prevent the Commission from modifying its attribution rules.** The Commission employs attribution rules to determine what types of ownership interests are counted in applying the national audience reach and other ownership limits. *See* 47 C.F.R. § 76.501. Like the UHF discount, the attribution rules are “related to” the national audience reach. Moreover, just as eliminating the UHF discount would cause some station owners currently in compliance with the national audience reach limit to exceed that limit, changes in attribution rules may also affect whether a station owner is in compliance with ownership limits.

An expansive interpretation of “any” in the context of “rules related to” national audience reach will not only lead to absurd results but will significantly limit FCC authority beyond the UHF discount. The Supreme Court validated the FCC’s narrow interpretation of “any” in *Nixon* in part because the results of an expansive reading would have been absurd. At the minimum, the different definitions of “any” and the possibility of absurd results lead to ambiguous language that the agency can reasonably interpret. *Chevron U.S.A. Inc v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The only reasonable interpretation is that the Commission’s authority over “any rules related to” the national audience reach cap are not limited by the Appropriations Act.

CONCLUSION

For the foregoing reasons, the FCC continues to have the authority to modify or eliminate the UHF discount and any other rules related to the national audience reach limitation. UCC respectfully requests that the FCC act upon petitions for reconsideration filed in the proceeding and eliminate or modify the 50% UHF discount to accurately reflect current market conditions.

Respectfully Submitted,

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